FILED
MAR 13 1981

No. 80-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ROGER S. KAPLAN
261 Madison Avenue
New York, N. Y. 10016
Attorney for Amicus Curiae Chamber of Commerce of the United States of America

Of Counsel

ROBERT LEWIS
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
261 Madison Avenue
New York, N. Y. 10016

STEPHEN A. BOKAT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

No. 80-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 36.1, for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case. This motion is necessitated by the refusal of Respondent Local Union 323, International Brotherhood of Electrical Workers, to consent to the filing of the appended brief.[1]

---

[1] Respondent National Labor Relations Board (by the Solicitor General) and the Petitioner have consented pursuant to Supreme Court Rule 36.2.

The interest of the *amicus curiae* is described in its brief. To summarize, the Chamber of Commerce is the major federation of business and professional organizations, large and small, with more than 90,000 members. Many of its members are small business organizations engaged in the construction industry.

The Court of Appeals' holding permits a labor union to picket a construction site gate reserved for neutral contractors simply because supplies eventually to be used by the primary employer in its work on the site are delivered through the gate by an outside supplier to the independent neutral contractor (the project owner) which ordered them.

By creating uncertainty whether Congress' objective of "shield[ing] unoffending employers and others from pressures in controversies not of their own" at construction sites retains vitality, *NLRB* v. *Denver Building and Const. Trades Council,* 341 U.S. 675, 692 (1951), the Court of Appeals' decision directly affects many of the Chamber's members—not only construction contractors, but their suppliers and customers, as well. They can no longer accurately determine their rights under § 8(b)(4) of the National Labor Relations Act,[2] or reasonably assess their exposure to costly work interruptions and delays. Indeed, the decision below may foster picketing which closes down entire construction sites, since neutral gates once thought secure may now be found "tainted." To the extent inroads are permitted on the protection afforded employers by the Court's decision in *Denver Building Trades,* the Chamber's members thus are vitally concerned.

While counsel for Petitioner has represented the interests of his client well, the Chamber believes it would be

---

[2] 29 U.S.C. §§151, 158(b)(4).

helpful for the Court to be apprised of the views of the broader business community regarding the decisions below, and therefore, of the necessity for resolving the issue presented by the petition. Because of its large and varied constituency, the Chamber is especially suited to fulfill this duty. The Chamber also believes that it may illuminate certain issues raised by the Court of Appeals' exposition, such as that court's dubious reliance on a discredited "economic realities" rationale (see Brief, *infra* at pp. 7-10), which have been not fully explored elsewhere.

For these reasons, we respectfully request that this Motion for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

ROGER S. KAPLAN
261 Madison Avenue
New York, N. Y. 10016
Attorney for Amicus Curiae
Chamber of Commerce of the
United States of America

Of Counsel

ROBERT LEWIS
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, N. Y. 10016

STEPHEN A. BOKAT
National Chamber Litigation
Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

REASONS FOR GRANTING THE WRIT 3

I. This Court Should Determine Whether Its Decision in General Electric Has an Impact on Denver Building Trades, Thereby Resolving a Conflict in the Circuits as to the Permissible Scope of Reserved Gate Picketing at Construction Sites 3

II. Review Is Warranted to Determine Whether a Discredited "Economic Realities" Rationale May Be Employed to Overcome the Independent Contractor Status of Construction Site Enterprises, and Thus Avoid a Secondary Boycott Finding 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Bartels v. *Birmingham*, 332 U.S. 126 (1947) 8, 8n

Carpenters Local 470 v. *NLRB*, 564 F.2d 1360 (9th Cir. 1977) 5

Connell Construction Co. v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) 2n, 9

Linbeck Construction Corp. v. *NLRB*, 550 F.2d 311 (5th Cir. 1977) 5

Local 777, Democratic Union Organizing Committee v. *NLRB*, 603 F.2d 862 (D.C. Cir. 1978) 9n

PAGE

Local 761, International Union of Electrical Workers v. *NLRB*, 366 U.S. 667 (1961) 4

Markwell and Hartz, Inc. v. *NLRB*, 387 F.2d 79 (5th Cir. 1967) 5

National Woodwork Manufacturing Assn. v. *NLRB*, 386 U.S. 612 (1967) 9
NLRB v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) 2-3, 4, 4n, 5
NLRB v. *Hearst Publications*, 322 U.S. 111 (1944) 8, 8n
NLRB v. *Nashville Building and Construction Trades Council*, 383 F.2d 562 (6th Cir. 1967) 5
NLRB v. *Retail Store Employees Union*, —— U.S. ——, 100 S.Ct. 2372 (1980) 2n
NLRB v. *United Insurance Co.*, 390 U.S. 254 (1968) 9

United States v. *Silk*, 331 U.S. 704 (1947) 8
United States v. *W. M. Webb Co.*, 397 U.S. 179 (1970) 9
United Steelworkers of America v. *NLRB*, 367 U.S. 492 (1964) 4

Statutes:

29 U.S.C. §§ 151, *et seq.* 2n

No. 80-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Interest of the Amicus Curiae*

The Chamber of Commerce of the United States of America (hereinafter "the Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade and professional organizations in the United States. It has a total membership in excess of 90,000 business firms

---

* Although Petitioner and Respondent National Labor Relations Board have consented to the participation of the Chamber of Commerce in this proceeding, Respondent Local 323, International Brotherhood of Electrical Workers, has not. Accordingly, a motion for leave to file this brief is filed herewith. Supreme Court Rule 36.1.

and individuals, including more than 3,800 state and local chambers of commerce and trade associations. A majority of the Chamber's members are small businesses, each employing 100 or fewer employees. In order to represent its members' views of questions of importance to their vital interests, and to assist this Court in its deliberations on such matters, the Chamber has frequently participated as *amicus curiae* before this Court in cases concerning the interpretation of the National Labor Relations Act ("the Act").[1]

At issue in this case is whether a secondary employer at a construction site (the project owner) loses its status as a neutral under the Act, and therefore must suffer picketing at its separate reserved gate, merely because the primary employer (an electrical subcontractor), with whom a union has a dispute, as a small portion of its work installs lighting fixtures which were acquired by the project owner from an outside supplier. A divided Court of Appeals sustained the National Labor Relations Board's determination that the neutrality of the reserved gate was breached by the delivery of the fixtures to the project owner through that portal. It therefore held that the picketing at the reserved gate was lawful.

The issue presented by this case is of vital concern to the Chamber, since many of its members are contractors engaged in the construction industry. The decision of the Court of Appeals, if sustained, would upset the delicate balance of economic power between employers and labor organizations established by this Court for the construction industry thirty years ago. *NLRB* v. *Denver Bldg.*

---

[1] 29 U.S.C. §§151, *et seq.* *See*, e.g., NLRB v. Retail Store Employees Union, —— U.S. ——, 100 S.Ct. 2372 (1980); Connell Constr. Co. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1975). This case involves a construction of §8(b)(4), 29 U.S.C. §158(b)(4).

and Construction Trades Council, 341 U.S. 675 (1951). It would seriously endanger many small businesses engaged in the industry by subjecting them to picketing in labor disputes not of their own making. Accordingly, the Chamber submits this brief *amicus curiae* in support of the petition for certiorari filed by the J.F. Hoff Electric Co.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Determine Whether Its Decision in *General Electric* Has an Impact on *Denver Building Trades,* Thereby Resolving a Conflict in the Circuits as to the Permissible Scope of Reserved Gate Picketing at Construction Sites.

Describing the issue before the Court of Appeals, Judge Wald wrote for the majority:

> This case poses the problem of whether a "neutral gate," set up by a construction contractor to insulate neutral employers at a common site from the impact of union picketing, lost its protected status when supplies, *intended to be used by the primary employer* but ordered and owned by the owner of the construction project, were delivered through the gate.

(Pet. App. 2) (emphasis added).[2] The court below, over the dissent of Judge Wilkey (but in agreement with the Board), held that it did. Thus, the Court of Appeals concluded that "when one subcontractor delivers goods to a job site to be used solely by another subcontractor who is

---

[2] "Pet. App." refers to the Appendices to the Petition for Certiorari containing the decisions below.

the primary employer," picketing at the point of entry to the site is permissible, regardless of where legal title to the materials may lie. (Pet. App. 12-13, 14). The ultimate question, however, is whether this "intended use" test is appropriately applied to construction site cases.

In *NLRB* v. *Denver Bldg. and Construction Trades Council*, 341 U.S. 675 (1951), this Court held that, despite a general contractor's exercise of "some supervision" over a subcontractor working at the same site, and their engagement in the same general business, they remained "independent contractors" for purposes of § 8(b)(4) of the Act, and that this relationship was "too well established in the law to be overridden without clear [statutory] language doing so." *Id.* at 690 and n.19. Therefore, it held, a building trades union violated the Act when it engaged in a strike and picketing with an object of forcing a general contractor on a construction project to terminate its contract with a non-union subcontractor. The *Denver Building Trades* case appeared to establish broad protection for construction site contractors, despite their functional interrelationship, against secondary picketing.[3]

Here, in contrast, the Court of Appeals applied to the construction industry a variant of the "work relatedness" test, developed in this Court's decisions post-dating *Denver Building Trades* pertaining to industrial plants: *Local 761, International U. of Elec. Wkrs.* v. *NLRB*, 366 U.S. 667 (1961) (the "*General Electric*" case), and *United Steelworkers of America* v. *NLRB*, 376 U.S. 492 (1964) (the "*Carrier Corporation*" case). In these decisions, the Court

---

[3] As we state in Point II, *infra* pp. 7-10, this Court has continued to recognize the close working ties among construction site enterprises and, furthermore, Congress has refused to pass the kind of overruling legislation envisioned by the Court in *Denver Building Trades*.

limited the protection afforded by a manufacturer's "neutral" gate to "work done by . . . secondary employees [which] is unrelated to the normal operations of the primary employer . . . ," *General Electric*, 366 U.S. at 679; *Carrier Corporation*, 376 U.S. at 497-98. It affirmed the employees' right "to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day services essential to the plant's regular operations." *Carrier Corporation*, 376 U.S. at 499 (footnote omitted).

This "work relatedness" test, however, has been limited in application to the manufacturing sector. The courts of appeals have refused to extend it to the construction industry. *Markwell and Hartz, Inc.* v. *NLRB*, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968); *Carpenters Local 470* v. *NLRB*, 564 F.2d 1360, 1362 (9th Cir. 1977); *NLRB* v. *Nashville Bldg. and Const. Trades Council*, 383 F.2d 562, 565-66 (6th Cir. 1967). Even the Fifth Circuit in *Linbeck Construction Corp.* v. *NLRB*, 550 F.2d 311 (5th Cir. 1977), upon which the Board and Court of Appeals rely here, professed to follow this approach. *Id.* at 316.

Although questioning whether *Denver Building Trades* "survived the *General Electric* decision" (Pet. App. 15), the Court of Appeals nevertheless attempts to deny that its holding represents an extension of the "work relatedness" test to the construction industry. Citing *Linbeck*, it asserts that its standard applies only where the deliveries are "essential to the normal operations" of the primary employer, and thus maintains that its holding is "far narrower" than the criterion used in *General Electric*. We doubt this.

First, the Court of Appeals' own formulation of the issue, *supra* p. 3, says nothing about "essentiality" or "normal operations." It looks only to the identity of the intended user of the materials being delivered. This focus

on the supplier relationship—a "commonsense" approach, according to the Court of Appeals majority (Pet. App. 20 n.11)—is the very sort of inquiry contemplated by *General Electric*. Second, as observed by Judge Wilkey, the *Linbeck* court "drew its analysis primarily from *General Electric* and [*Carrier Corporation*], a second industrial plant picketing case"; and *General Electric*, itself, spoke of work "necessary to the normal operations" of the primary employer, 366 U.S. at 682, "thus leaving no vestige of difference in the majority's 'essential to normal operations' standard" (Pet. App. 35). In short, the Court of Appeals appears to have applied the *General Electric* standard to a construction site case.

Judge Wilkey's dissent dramatically describes the sweep of the majority's holding and the basis for the Chamber's concern. On construction sites, he noted, "[*i*]*t is difficult to imagine any relationship between independent contractors that is not either supplier or customer.*" (Pet. App. 29) (emphasis in original). And since both suppliers and customers of a primary employer may be subject to picketing under the Court of Appeals' analysis (Pet. App. 28), almost all related enterprises may be drawn into a dispute. Thus, we are as bewildered as Judge Wilkey when he wrote, "What this approach leaves of *Denver Building* is hard to see." (Pet. App. 30)

The question deserves an answer by this Court.

II.

Review Is Warranted to Determine Whether a Discredited "Economic Realities" Rationale May Be Employed to Overcome the Independent Contractor Status of Construction Site Enterprises, and Thus Avoid a Secondary Boycott Finding.

In sustaining the NLRB's decision dismissing Hoff's §8(b)(4) complaint, the Court of Appeals held:

> Applying the principles underlying *General Electric* to the question of who is a "supplier" or "customer" to whom the pickets may legitimately appeal, *we agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis focusing on the intended use of the supplies.* Thus if in fact and practice, Consolidated [the company supplying lighting fixtures for installation on the site] was delivering supplies which in the normal course of its business Hoff used and installed, Consoliated was a "supplier" of Hoff, no matter where legal title to the supplies might lie,[4] and by using the South gate [reserved for contractors other

[4] Member Murphy, dissenting from the Board's decision, noted that the fixtures continually had been "selected, ordered, purchased, delivered to, received, owned and stored by the projected owner itself, and not Hoff." (Pet. App. 45) (emphasis in original). Thus, the project owner undertook complete responsibility for obtaining the lighting fixtures to be used on the site; Hoff's obligation was limited to installing the fixtures so obtained (Pet. App. 44). This is *not* a case where, on the eve of picketing, the parties undertook to disguise the primary's interest as the true purchaser of materials in order to reduce the primary's exposure to lawful economic pressure. (Pet. App. 33, 36 n.30) *Cf.* International Union of Operating Engineers, Local Union No. 451, AFL-CIO (Linbeck Construction Corp.), 219 N.L.R.B. 997, 1002 (1975), *enforced*, 550 F.2d 311, 317-18 (5th Cir. 1977) (employees of general contractor began receiving materials on site only after picketing of the primary had begun).

> than Hoff] Consolidated contaminated its neutrality, permitting its picketing by the Union.

(Pet. App. 15) (emphasis and material in brackets added). The Court of Appeals continued:

> [*W*]*e approve the Board's looking to the realities of the relationships* [*"applying a commonsense test focusing on who is actually delivering supplies for the use of the primary employer"*] *rather than to the formalities of legal title.* We affirm the Board's conclusion that no unfair labor practice was committed by the Union's picketing of the South gate.

(Pet. App. 20; bracketed matter, *id.*, n.11) (emphasis added).

The emphasized passages harken back more than three decades to this Court's decisions in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), *United States* v. *Silk,* 331 U.S. 704 (1947), and *Bartels* v. *Birmingham,* 332 U.S. 126 (1947), which Congress was to reject. The "realities-of-the-relationships" standard used in this case by the Board and Court of Appeals majorities to escape the consequence of treating construction site enterprises as independent contractors, *see Denver Building Trades, supra,* is the lineal descendant of the "economic facts" or "economic reality" rationales of *Hearst* and *Silk,* respectively.[5] Those rationales also had as their aim the avoidance of independent contractor treatment. In *Hearst,* for example, the Court held that independent merchants who bought newspapers from a publisher were "employees" of the publisher, even though these merchants had employees of their own. It believed that the broad social purposes of the

---

[5] *See Hearst, supra,* 322 U.S. at 128; *Silk, supra,* 331 U.S. at 713. *See also, Bartels, supra,* 332 U.S. at 130 ("economic reality").

Act could be achieved only by restricting the scope of exempt classifications.

As this Court later recognized, however, Congress in 1947 repudiated such a "standard . . . of economic and policy considerations within the labor field" in favor of the application of traditional agency principles under common law. *NLRB* v. *United Insurance Co.,* 390 U.S. 254, 256 (1968). Congress would not condone a standard "whose 'basic principle is a dimensionless and amorphous abstraction. . . .'" *See United States* v. *W. M. Webb Co.,* 397 U.S. 179, 188 (1970) (quoting S. Rep. No. 1255, 80th Cong., 2d Sess., at 12 (1948) [Report of the Senate Finance Committee on a joint resolution disapproving application of the "economic reality" test to determine employee status under Federal Insurance Contributions Act and Federal Unemployment Tax Act]).[6]

Here, the "realities" test of the Court of Appeals is similarly afflicted. Considering the close functional relationship among construction site enterprises, *see National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612, 639 (1967); *Connell Const. Co.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 629-30 (1975), and the common practice of owners and general contractors to assume responsibility for acquiring materials to be installed by subcontrctors,[7] the "realities of the relationships" may

---

[6] Ironically, in spurning another recent Board attempt to avoid an independent contractor determination based on "the 'business realities' of the relationships" (between taxicab companies and their lessee drivers), the District of Columbia Court decried such "realities" as "vague generalities [which] do not rise to the dignity of factual findings." Local 777, Democratic Union Organizing Comm'ee, S.E.I.U. v. NLRB (Yellow Cab Co.), 603 F.2d 862, 908 (D.C. Cir. 1978). But the same court made no attempt to distinguish *Yellow Cab* from its decision here.

[7] Petition, at 15.

take the Board (or a reviewing court) as far as a particular panel chooses to go. It is an unbridled license for the agency or court to permit secondary picketing regardless of the facts. That disregard is especially evident where, as here, the facts demonstrate a bona fide proprietary interest by the neutral secondary in acquiring the disputed materials. See n. 4, *supra* p. 7. Evidently recognizing the dangers inherent in such a rationale, Congress has consistently rebuffed attempts to overrule *Denver Building Trades* by those pointing to the same "economic realities in the construction industry" which are advanced here. *See* H. R. Rep. No. 96, 95th Cong., 1st Sess., 6 (1977), and other proposals cited by Judge Wilkey (Pet. App. 37-38).

This Court should accept review to determine whether the Court of Appeals' reasoning is consistent with Congress' intent that the Board to adhere to commonly accepted principles of independent contractor status and that it give effect to the consequences which derive from that status in administering the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROGER S. KAPLAN
261 Madison Avenue
New York, N. Y. 10016
Attorney for Amicus Curiae
Chamber of Commerce of the
United States of America

Of Counsel

ROBERT LEWIS
JACKSON, LEWIS, SCHNITZLER
& KRUPMAN
261 Madison Avenue
New York, N. Y. 10016

STEPHEN A. BOKAT
National Chamber Litigation
Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062